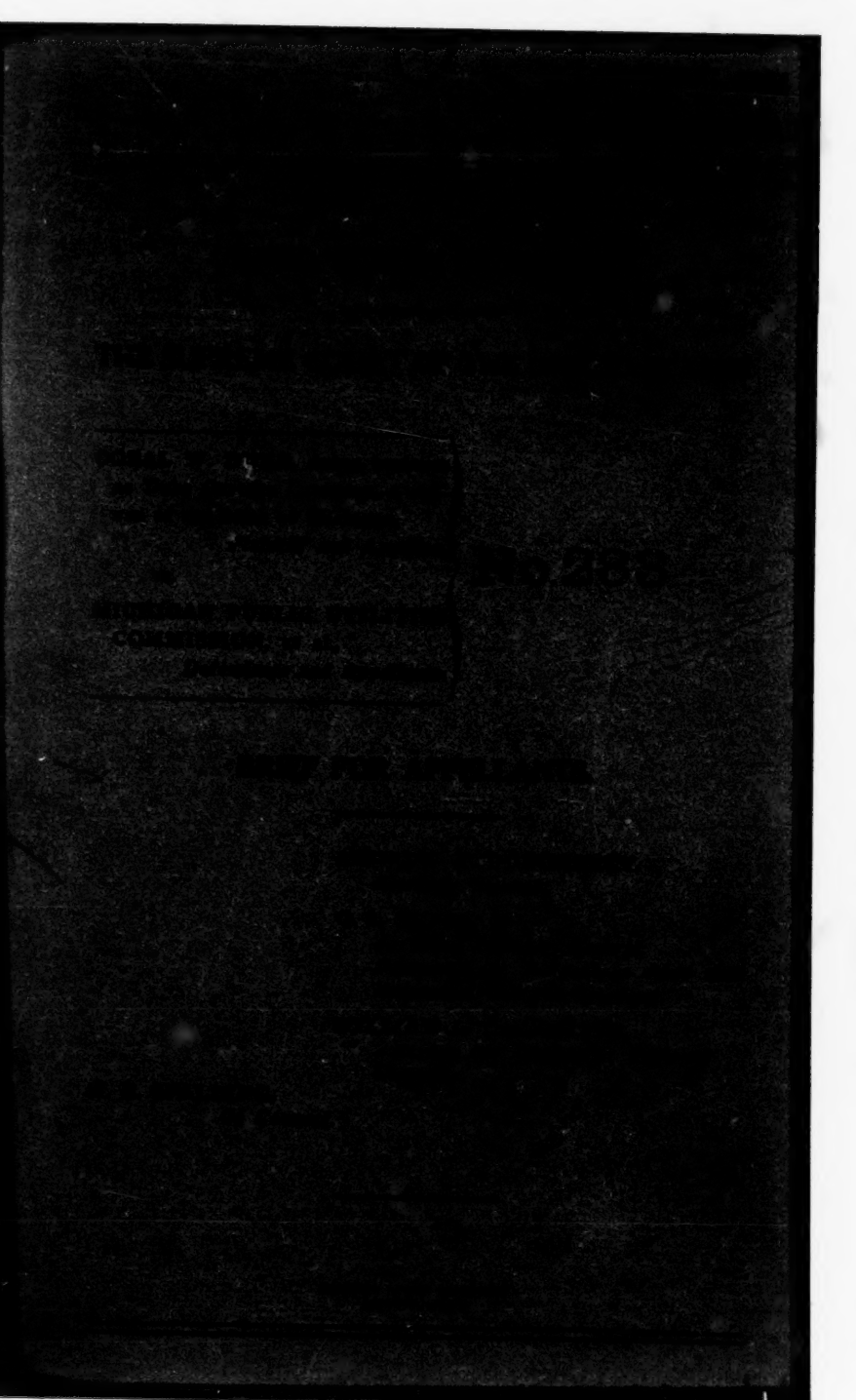

INDEX

ARGUMENT

LIST OF CASES CITED

UNITED STATES OF AMERICA

THE SUPREME COURT OF THE UNITED STATES

CORAL W. DUKE, doing business as Duke Cartage Company, a citizen of the State of Michigan,
Plaintiff and Appellee,

vs.

MICHIGAN PUBLIC UTILITIES COMMISSION, et al.,
Defendants and Appellants.

BRIEF FOR APPELLANTS.

This is an appeal from an order made under Sec. 266 of the Judicial Code upon the application of the appellee, Coral W. Duke, granting an interlocutory injuction restraining the enforcement against him of Act No. 209 of the Public Acts of the State of Michigan of 1923, upon the ground that sections 3 and 7 of said Act are unconstitutional.

The bill of complaint (Par. 19 R. p. 3) represents that the plaintiff (the present appellee) is engaged in the transport of freight by motor vehicles between points in the State of Michigan and the State of Ohio, operating in part over public highways of the state, but that all of the

freight which he carries is carried under certain contracts with automobile manufacturers and that he does not hold himself out as a carrier for the public generally. It was filed to restrain upon constitutional grounds the enforcement against the plaintiff and his business of Act No. 209 of the Public Acts of Michigan of 1923, which as stated in its title is

> "An Act to regulate and define common carriers of persons and property by motor vehicle on public highways of this state, prescribing the payment and fixing the amount of privilege taxes for such carriers, the disposition of such taxes and prescribing penalties for violations of this act."

The act is as follows (See Rec. 4):

> AN ACT to regulate and define common carriers of persons and property by motor vehicle on public highways of this state, prescribing the payment and fixing the amount of privilege taxes for such carriers, the disposition of such taxes, and prescribing penalties for violation of this act.

The People of the State of Michigan Enact:

Section 1. After thirty days from the effective date of this act, no person, firm or corporation shall engage or continue in the business of transporting persons or property, by motor vehicle, for hire, upon or over the public highways of this state, over fixed routes or between fixed termini, or hold themselves out to the public as being engaged in such business, unless and until they shall have obtained from the Michigan Public Utilities Commission a permit so to do, which said permit shall be issued in accordance with the public convenience and necessity and

shall not be assignable: Provided, That this act shall not apply to carriers operating exclusively within cities or villages.

Sec. 2. Said commission shall, by general order, prescribe such rules and regulations as shall, by it, be deemed appropriate, under this act. Said commission may withhold such permit in whole or in part, when it appears to the commission that the applicant is not or will not be able to furnish adequate, safe or convenient service to the public, but not without just cause.

Sec. 3. Any and all persons, firms or corporations, now engaged, or which shall hereafter engage, in the transportation of persons or property for hire by motor vehicle, upon or over the public highways of this state, or any of them, as above described, shall be common carriers, and, so far as applicable all laws of this state now in force or hereafter enacted, regulating the transportation of persons or property by other common carriers, including regulation of rates, shall apply with equal force and effect to such common carriers of persons and property by motor vehicle upon or over the public highways of this state as above provided.

Sec. 4. Such permit, when granted, shall specify the route or routes over which the person, firm or corporation to whom the same may be granted shall have a right to operate, and may cover the whole or any part of the route or routes applied for. Any law or laws now in force or hereafter enacted, regulating the practice before said commission, or the method of reviewing its order, shall apply with equal force and effect to proceedings had or taken before said commission under this act.

Sec. 5. "Fixed routes, or between fixed termini," as used herein, or in any permit hereunder, shall mean the route or termini over or between which said carrier shall usually or ordinarily operate such motor vehicle, though departures from such route or termini may be periodical or irregular. Whether such motor vehicle is operated over fixed routes or between fixed termini shall be a question of fact, and the commission's finding thereon shall be final.

Sec. 6. Said commission may, after notice given and hearing granted to any person, firm or corporation to whom a permit may have been granted, suspend or revoke the same for a violation of this act or of any lawful order, rule or regulation of said commission.

Sec. 7. Any and all common carriers under this act shall carry insurance for the protection of the persons and property carried by them in such amount as shall be ordered by said commission, and in insurers approved by the commissioner of insurance of this state, or shall furnish an indemnity bond running to the people of the state of Michigan, conditioned upon the payment of all just claims and liabilities resulting from injury to persons or property carried by such carrier, and in a company authorized to do business in this state, in an amount to be fixed and approved by said commission.

Sec. 8. Such permit shall entitle the carrier to whom it is issued to transport persons or property or both, over the route or routes and between the termini indicated on the face of such permit. Every such carrier shall pay to the commission for the use of the state, at or prior to the

issuance of the permit, and as a fee for the privilege of engaging in the business defined in section one hereof, for one year, a sum of money to be computed as follows: One dollar for each one hundred pounds weight of each motor vehicle employed by it in such business; and shall thereafter pay at a similar rate for each one hundred pounds weight of each motor vehicle added or acquired during any license year, which fees shall be in addition to any motor vehicle tax prescribed by the general motor vehicle law of the state. Each permit shall be good for a period of one year from its date, and at the expiration thereof may be renewed by the commission upon like terms and conditions from year to year thereafter. All fees received hereunder shall be paid into the state treasury, and are hereby appropriated to the general highway fund of the state for highway purposes. Nothing in this section shall be construed to interfere with the right of any city or village to the reasonable control by general regulation, applicable to all motor vehicles, of its streets, alleys and public places, or to authorize a carrier to do a local business without the consent of the municipality in which such local business is wholly carried on.

Sec. 9. Any person, firm or corporation violating any of the provisions of this act, or any lawful order, rule or regulation of said commission shall be liable to a fine not exceeding one hundred dollars, or imprisonment in the county jail not over ninety days, or both such fine and imprisonment in the discretion of the court; and if a corporation, its corporate officers, having the management of the business of such carrier, shall be personally subject to a fine not exceeding one hundred

dollars or imprisonment in the county jail not more than ninety days, or both such fine and imprisonment in the discretion of the court.

Sec. 10. Said commission may use any and all available legal and equitable remedies of a civil nature to enforce the provisions of this act, or any lawful order, rule, or regulation made in pursuance hereof.

Sec. 11. Each section of this act shall be independently operative, and if any of said sections shall be declared invalid by any court of competent jurisdiction, it shall not affect or invalidate the remainder of this act.

This act is ordered to take immediate effect.

Approved May 23, 1923.

Various propositions going to the constitutionality of the entire act were urged in this case and in a similar suit brought by the Liberty Highway Company, which was argued at the same time, but the act was sustained with the exception of sections 3 and 7. The principal discussion of the validity of these sections is in the opinion in the Liberty Highway Company's case, which for that reason is incorporated in the record (R. p. 29).

Section 3 provides in substance that all who engage in transportation of persons or property for hire by motor vehicle over public highways of the state over fixed routes or between fixed termini, shall be common carriers, and subjects them to all other laws regulating transportation by common carriers *so far as applicable.* Section 7 requires all carriers regulated by the act to protect their

patrons against injury sustained by persons or property carried, while in transport on the state highways, either by insurance or by an indemnity bond (R. pp. 4, 5).

As to section 3, the Court was of the opinion that because in terms it applies to those carrying under private contract, as well as to those carrying for the public generally, it was not within the title and, therefore, violated section 21 of Article V of the Michigan Constitution providing that "no law shall embrace more than one object, which shall be expressed in its title." The Court was also of the opinion that this section of the act, because of its provision that so far as applicable all laws of the state regulating transportation by other common carriers shall apply to carriers under the act, was too vague and uncertain to furnish a sufficiently definite standard of guilt. See opinion Liberty Highway case (R. pp. 32, 35-6).

As to section 7 (and seemingly as to section 3), the Court was of the opinion that its provisions are void as a direct burden upon interstate commerce.

See opinion Liberty Highway case (R. p. 34).

Upon these grounds the Court held sections 3 and 7 of the Act to be unconstitutional and void, decided that the Act does not, therefore, apply to private carriers, and granted the injunction complained of accordingly. We claim that the court was in error in so holding and in each of its conclusions above stated. The several errors complained of are covered by the assignments of error 1 to 5. (Rec. p. 37.)

It was argued also for the plaintiff, though the point was not passed on by the Court, that to make those carrying under private contracts common carriers was a taking of private property without compensation, in contravention to the 14th amendment to the United States Constitution.

The questions then presented upon this appeal are:

1. Whether consistently with the 14th amendment the legislature may require those engaged, or after the passage of the Act engaging, in motor vehicle transportation for hire on public highways, thereafter to carry on that business as common carriers.

2. Whether a provision making all who engage in motor vehicle transportation over public highways common carriers under the act and subject to regulation as such, is within the title of an act "to regulate and *define* common carriers of persons and property by motor vehicle on public highways of this state," in conformity with Section 21 of Article 5 of the Michigan Constitution above referred to.

3. Whether the provision subjecting carriers under the act to all other laws of the state regulating transportation by other common carriers *so far as applicable*, is invalid because indefinite.

4. Whether a state may require all carriers over its highways, including those engaged in interstate transportation, by insurance or bond to protect their patrons against injuries sustained in carriage upon the highways of the state.

ARGUMENT

I.

The 14th amendment is not violated by requiring all those using public highways in motor vehicle transportation for hire, including those who have previously done that business under private contract, to become common carriers.

A common carrier is not required to carry goods that he has not facilities to handle, or for which he has not space, nor is he required to carry goods of a class that he does not hold himself out to carry. He must, however, carry for all who offer, indifferently. This is the distinguishing characteristic of his business.

Highways are established for the use and convenience of the public. Their regulation and control is in the legislature or in those subordinate bodies, administrative or municipal to which it has delegated the power of regulation. The legislature may impose any regulation or limitation upon the use of highways that might conceivably promote the public interest—anything not clearly arbitrary, anything that may facilitate traffic or make it safe, lessen the wear or prevent the destruction of the road bed, or relieve the public burden of construction and maintenance—is within legislative competence. It may limit the speed and weight of vehicles. It may prescribe types of vehicular construction. It may exclude traffic of certain kinds, or condition the use of highways in such traffic upon the payment of certain fees.

These principles are well established, and the following illustrative cases might be multiplied indefinitely.

Scovel vs. Detroit, 146 Mich. 93.

In this case, under statutory authority, a certain portion of a boulevard had been set aside as a speed-way. This action was attacked by the owners of abutting property as in contravention of the purposes of a boulevard and therefore invalid. It was sustained as the exercise of a power which the legislature was competent to confer.

Commonwealth vs. Kingsbury, 199 Mass. 542.

This case sustained the exclusion of automobiles from certain streets under statutory authority, the Court saying, (page 546):

> "The right of the legislature, acting under the police power, to prescribe that automobiles shall not pass over certain streets or public ways in a city or town, seems to us well established both upon principle and authority."

Dobson vs. Mescall, 199 N. Y. S., 800.

This case sustained an amendment to the Public Service Commission Act of New York. The amendment placed bus lines under the jurisdiction of the Commission, and provided that a bus line should not receive a certificate of public convenience and necessity without procuring the consent of the local authorities of the city in which the line was to operate. The Court say (page 802):

> "There is no constitutional right to use a public highway in the operation of the private business of a common carrier for profit without the consent of

> the state and no constitutional right would be abridged by the refusal of such consent."

People vs. Rosenheimer, 209 N. Y. 115.

This case sustained a statute requiring any person operating a motor vehicle, knowing that through his fault or through accident, injury had been caused to a person or property, to report the accident, giving his name and address. The objection raised was that this was in violation of the constitutional provision that no person should be compelled in a criminal case to be a witness against himself. The statute was sustained on the ground that the legislature might prohibit altogether the use of motor vehicles upon the highways. The Court say on page 120:

> "Doubtless the legislature could not prevent citizens from using the highways in the ordinary manner, nor would the mere fact that the machine used for the movement of persons or things along the highway was novel justify its exclusion. But the right to use the highway by any person must be exercised in a mode consistent with the equal rights of others to use the highway."

After pointing out the special need of the regulation of motor vehicle use, and the fact that in view of the danger incident thereto the legislature might prohibit the use of such vehicles the opinion continues:

> "Of course, the whole of this argument rests on the proposition that in operating a motor vehicle the operator exercises a privilege which might be denied him, and not a right, and that in a case of a

privilege the legislature may prescribe on what conditions it shall be exercised."

Northern Pacific Railway Co. vs. Schoenfeldt, 123 Wash., 579.

Here the Court in sustaining the constitutionality of a statute regulating motor vehicle transportation, against the objection that such regulation was not within the police power of the State, said (page 585):

"We have repeatedly held that the legislature may regulate the use of the highways for carrying on business for private gain, and that such regulation is a valid exercise of the police power."

In this connection the Court quotes from its former decision in

Hadfield vs. Lundin, 98 Wash., 657.

"The state, and the city as an arm of the state, has absolute control of the streets in the interest of the public. No private individual or corporation has a right to the use of the streets in the prosecution of the business of a common carrier for private gain without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality, as the case may be. The use of the streets as a place of business or as a main instrumentality of business is accorded as a mere privilege and not as a matter of natural right."

Ex Parte Dickey, 76 W. Va., 576.

This case involved the constitutionality of an ordinance licensing and regulating the operation of jitney busses. In sustaining the ordinance the Court say (page 578):

> "As regards legislative power or control, the business or interest regulated by the ordinance is clearly distinguishable from vocations the pursuit of which does not involve the use of public property. The right of a citizen to pursue any of the ordinary vocations, on his own property and with his own means, can neither be denied nor unduly abridged by the legislature; for the preservation of such right is the principal purpose of the constitution itself. * * * But when a citizen claims a private right in public property, such as a street or park, a different situation is presented. Such properties are devoted primarily to general and public, not special or private uses, and they fall within almost plenary legislative power and control. * * * The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader, the right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature."

The Court quotes with approval, page 580, from

***Jersey City Gas Co. vs. Dewight,* 29 N. J. Eq. 242,**

the statement that

> **"The rule must be considered settled that no person can acquire the right to make a special or exceptional use of a public highway, not common to all citizens of the state, except by grant from the sovereign power."**

The same principle is affirmed by this Court in *Packard vs. Banton,* 264 U. S., 140, which was a suit to enjoin the enforcement of a state law, alleged to violate the Fourteenth Amendment because it required persons engaged in the business of carrying passengers for hire in motor vehicles on public streets to give security for the payment of judgments for death or injury to persons or property caused in the operation or by defective construction of the vehicle. It was contended that the Act was an unreasonable discrimination against those engaged in operating motor vehicles for hire in favor of those operating such vehicles for private ends and in favor of street cars and motor omnibuses. In overruling this contention, the court says (p. 144):

> "If the State determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire, there is nothing in the Fourteenth Amendment to prevent. The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper."

It was further contended that the requirements of the statute were so burdensome as to be confiscatory and to result in depriving appellant of his property without due process of law. In overruling this contention, the Court say (p. 145):

> "Moreover, a distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former."

It is obvious that while the cases in which this rule was laid down were mostly cases of common carriers, the principle that those who use the public highways as a place of business for private gain are exercising a privilege and not a right, is as applicable to private as it is to public carriers.

To the same end, the protection of the public interest, the legislature may therefore require those who use the public highways in their private business of transportation for hire, to carry for the public at large as well as under private contract, and to be subject to regulation and control as common carriers.

The legislature can not subject private property to public use without compensation, but it may condition the use of public property—a public facility—in the transaction of a private business in such a manner as to insure the convenience and accommodation of the public.

It is therefore competent for the legislature to require those who at the passage of the act are engaged or thereafter engage in motor vehicle transportation for hire on the public highways to do that business as common carriers. That is, without precluding them from carrying out such special contracts as they have made, it may compel them, if they continue in the business, to become common carriers and submit to the regulations which the act imposes on such carriers.

The Pipe Line Cases, 234 U. S. 548.

In this case, an amendment made in 1906 to the Interstate Commerce Act was sustained. The important provision was that the act was made to apply to all corporations and persons engaged in the transportation of oil or other commodity, except water and gas, by pipe lines or partly by pipe lines "who shall be considered and held to be common carriers within the meaning and purpose of this act." An order has been made by the Interstate Commerce Commission requiring the Standard Oil Company and other companies owning or controlling oil pipe lines to file schedules of rates and this order was attacked as unconstitutional. The Court held that with the exception of lines used only for the purpose of conducting oil from the owner's own wells to his refinery, the act applies to any person engaged in transportation of oil by pipe lines. The opinion states (p. 559):

> "The words 'who shall be considered and held to be common carriers within the meaning and purpose of this act' obviously are not intended to cut down the generality of the previous declaration to the

> meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such * * * As applied to them, while the amendment does not compel them to continue in operation it does require them not to continue except as common carriers."

It appeared that the pipe line companies while they transported all oil that was offered, compelled outsiders to sell it to them before transportation and it was claimed that under these circumstances the companies could not be made common carriers. Answering this objection, the Court say (p. 561):

> "The answer to their objection is not that they may give up the business, but that, as applied to them, the statute practically means no more than they must give up requiring a sale to themselves before carrying the oil that they now receive. The whole case is that the appellees if they carry must do it in a way that they do not like."

So in the present case, those who now carry under private contract, while not precluded from executing their outstanding contracts and not necessarily precluded from making other such contracts in the future, must nevertheless in the future conduct their business as common carriers. It is clear that if Congress can impose such an obligation upon pipe line companies operating over private right-of-way, a State Legislature may impose such an obligation upon carriers over public highways.

It was claimed in the court below by counsel for the present appellee that the statute, if applied to him, deprives him of the right to carry out his existing contracts of carriage, which fully occupy his entire equipment, and compels him to abandon these contracts and carry for the public at large. A common carrier is not required to furnish carriage for any one beyond the capacity of his equipment, nor being under contract for carriage is he obliged to abandon that contract in order to furnish transportation for such other persons as may demand his services.

A railroad being a common carrier may make a special contract for the carriage of particular kinds of property.

Michigan Southern Railroad Co. vs. McDonough, 21 Mich., 165, see page 196.

Lake Shore Railroad Co. vs.. Perkins, 25 Mich., 329.

Plaintiff's counsel in the Court below referred to, and presumably will here rely upon the case of

Producers' Transportation Company vs. Railroad Commission, 251 U. S., 228.

This case involved the validity of an order made by a State Railroad Commission requiring a pipe line company to file with the commission a schedule of its rates. The order was made under a statute which declared that everyone operating a pipe line for the transportation of oil directly or indirectly to or for the public for hire, and which is constructed on a public highway, and in favor of which the right of eminent domain exists, should be deemed a

common carrier, and subject to the jurisdiction of the railroad commission.

The pipe line company contended that the evidence taken by the commission, and which was also before the Supreme Court of California, which sustained the order, established that the pipe line was constructed solely to carry oil for particular producers under private contract; that there was no devotion of the line to public use and that the statute was therefore repugnant to the 14th amendment. The Court found, as had the Supreme Court of California, that these contentions were not supported by the facts: (1) because the company was by its articles of incorporation authorized to carry on a general transportation business; (2) because in acquiring its right of way it had exercised the power of eminent domain as a common carrier; (3) because it did in fact carry oil for all who sought its service, that is for the public.

In the course of the opinion, and before consideration of the facts, the Court remarked, page 230, (and this is the passage upon which plaintiff's counsel doubtless rely):

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment."

This is indubitable law, but as the Court point out it does not apply to a case where the line of transportation is acquired for public use under the power of eminent domain. Nor does it apply to a case like the present, where the conduct of the business involves the use of a transportation line already belonging to the public, and devoted to the public use, a public highway.

The cases cited by the Court in support of the statement quoted show the limitations of the doctrine. For instance,

> *Louisville & Nashville R. R. Co. vs. West Coast Naval Stores Co.*, 198 U. S., 483,
> *Northern Pacific Ry. Co. vs. North Dakota*, 236 U. S. 585.

The first of these cases held that a railroad company could not be compelled to share the use of a wharf which it had constructed for its own convenience with another competing carrier, the Court saying (page 495):

> "We are of opinion that the wharf was not a public one, but that it was a mere facility, erected by and belonging to defendant, and used by it, in connection with that part of its road forming an extension from its regular depot and yards in Pensacola, to the wharf, for the purpose of more conveniently procuring the transportation of goods beyond its own line, and that defendant need not share such facility with the public or with any carriers other than those it chose for the purpose of effecting such further transportation."

In the second of these cases a state statute requiring railroad companies to transport coal at a merely nominal remuneration was held invalid. The Court say (page 595), that the State may enforce, within the limits of its jurisdiction, the public duties of a common carrier, but that,

> "The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement."

The lengths to which the regulation of business, which does not involve the use of public property or service to the general public, may be constitutionally carried is shown by the following cases.

Brass vs. Stoeser, 153 U. S., 391.

This case sustained a statute regulating grain elevators and declaring all elevators operated for the purpose of the storage of and handling of grain for profit to be public

warehouses, and fixing their charges, notwithstanding that it appeared that the elevator in question was only used for the storage of grain other than that belonging to the owner of the elevator incidently and occasionally; in short that the owner did not hold himself out to, and in fact did not store for the public at large.

> In *German Alliance Insurance Co. vs. Kansas*, 233 U. S., 389,

a statute was sustained providing for the regulation of the business of fire insurance and fixing its rates. The Act was attacked upon the ground that the business of fire insurance was private and voluntary, receiving no privilege from the State, and that insurance rates were necessarily a matter of private negotiation. The Court held, however, that the business was such that regulation was necessary in the public interest. It was contended that the

> "test of whether the use is public or not is whether a public trust is imposed upon the property and whether the public has a legal right to the use which cannot be denied,"

and that

> "Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist."

The Court say, however, (page 407) that "the distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public in-

terest which gives the power of regulation as distinct from a public use which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle * * * nor has the other contention that the service which cannot be demanded cannot be regulated."

So in

Rast vs. Van Deman & Lewis, 240 U. S. 342,

where a statute imposing a special license tax upon merchants using trading stamps was sustained, the Court say (page 365):

"No refinement of reason is necessary to demonstrate the broad power of the legislature over the transactions of men. There are many lawful restrictions upon liberty of contract and business."

In

Block vs. Hirsh, 256 U. S., 135,
Marcus Brown Co. vs. Feldman, 256 U. S., 170,

the Court sustained statutes regulating rents, saying in the opinion of the first of the two cases cited (page 154):

"No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts. (Citing cases.) But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect. * * * The general prop-

> osition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such interest what at other times or in other places would be a matter of purely private concern."

The Court then quotes a number of cases with the comment that they illustrate that the use by the public generally of each specific thing affected cannot be made the test of public interest, and that they dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair.

It is evident then that if one who carries all goods offered, provided the offeror will sell to the carrier at his own price, may be controlled as a common carrier, as was held in *The Pipe Line Cases,* 234 U. S., 548, so one who uses public property (a highway) to carry for such customers as he selects, may be compelled to carry for all.

In the one case the carrier is required to give up the right to refuse to carry the goods of those who will not sell them to the carrier. In the other case the carrier is required to give up the exclusion from carriage of those whom it does not select as customers.

The legislature is the judge whether the privilege of using the public highways in private transportation for hire shall continue or cease. It might prohibit it alto-

gether. It may and in the present case it has, while not prohibiting its continuance, require that those who conduct it shall in the future permit the public to avail themselves of the facilities for using these highways, that the business equipment of these carriers may afford.

II.

The provisions of Section 3 of the Act are within its title.

The opinion of the judges in the Liberty Highway Company case states (R. p. 32) that as

> "the title to this act has reference only to common carriers, any provisions thereof so broad in their terms as to be applicable also to private carriers are foreign to such title and fall under the condemnation of the Michigan constitutional requirements herein referred to. Such provisions are the provisions of Section 3."

The act was by its title "An Act to regulate and *define* common carriers of persons and property by motor vehicle on public highways of this state." The Court was seemingly of the opinion that the State Legislature could not broaden the common law definition of common carriers so as to include those carrying under special contract.

There can be no doubt that the state has power to regulate the use of its highways by carriers, both public and private, and that it may classify traffic, exempting certain classes from regulation wholly or in part, if the classifi-

cation and exemption be on a reasonable basis. The act in question undertakes to regulate the use of the highways by a certain class of traffic, viz., the transportation of persons or property by motor vehicle for hire on the public highways over fixed routes or between fixed termini. This is clearly stated in Section 1. The attack on the validity of the act now under consideration is not based on a denial of the power to regulate those who, like the plaintiff, carry under private contract, but is based solely on the fact that such carriers are by the act treated as common carriers.

It is obvious that if those engaged in motor vehicle transportation on public highways can avoid the regulation and contribution to the expense of maintenance contemplated by the act, by the device of making special contracts of carriage and refusing to carry otherwise than under such contracts, there will be few who will remain subject to the provisions of the act.

We submit that it was competent for the Legislature to broaden the definition of common carriers on the state highways so as to include those carrying only under special contract, and that it was equally competent for it to require those carrying under such contracts to conduct their business in the future as common carriers. If either of these positions is sound, there is nothing in Section 3 which is foreign to the title of the act.

The constitutional provision invoked has been very often considered in the Supreme Court of Michigan. It has, as that Court says in

Loomis vs. Rogers, 197 Mich., 270,

> "proved a tempting source of attack on the validity of statutes with which parties are dissatisfied, for few laws of any length are enacted where the objection cannot be plausibly urged as to details and auxiliary provisions incidental to the main purpose of the legislation appearing in the body of the act and not itemized in the title."

That a Legislature may by statutory enactment broaden a common law definition does not need argument. The title of the act shows by the expression "define" that the Legislature intended to make common carriers on public highways something different from what at common law would be included in the definition of common carriers.

An Act to *define* common carriers may enlarge the class.

People vs. Bradley, 36 Mich., 447.

The act sustained in this case enlarged the boundaries of a city by annexing to it parts of adjoining townships, the title being "An Act to define the boundaries of the City of East Saginaw and the several wards and election districts thereof." It was claimed that the object was not indicated by the title and that the word "define" does not indicate an intention to enlarge, but merely to make certain what was previously uncertain or indefinite. The objection was overruled. The Court say, (p. 452):

> "While the word "define" may be, and frequently is, used in the sense and for the purpose claimed, and while we might concede such to be the general

and more popular use of the word, yet it is not used exclusively in such a sense. It has a broader and different meaning. It is frequently used in the titles of acts, and but seldom in the narrower sense, or as merely defining powers previously given. An examination of our session laws will show that acts have frequently been passed, the constitutionality of which have never been questioned, where the powers and duties conferred could not be considered as merely explaining, or making more clearly those previously conferred or attempted to be, although the word "define" was used in the title. In legislation it is frequently used in the creation, enlarging and extending the powers and duties of boards and officers, in defining certain offenses and providing punishment for the same, and thus enlarging and extending the scope of the criminal law. And it is properly used in the title where the object of the act is to determine or fix boundaries, more especially where a dispute has arisen concerning them. It is used between different governments, as, 'to define the extent of a kingdom or country.' Indeed, it is a word of very frequent and very general use, and although even the settlement of a disputed boundary must necessarily and inevitably extend the line and take in new or additional territory, within the understanding of one of the claimants, we have never heard of any question being made as to the want of authority to enlarge the possessions of another under a power given to define them."

In *Kurtz vs. People,* 33 Mich., 279, a liquor law passed under the title of "An Act to prevent the sale or delivery

of intoxicating liquors, wine and beer, to minors, and to drunken persons, and to habitual drunkards; to provide a remedy against persons selling liquor to husbands or children in certain cases" was held properly to include a provision that all saloons shall be closed on Sunday and within certain hours at night upon week days and that no sales should be made to anybody within those times. A conviction for such a sale was sustained against the objection that the prohibition of such sales was not within the title.

III.

The remaining provision of Section 3 subjecting carriers under the act to all laws of the state regulating transportation by other common carriers so far as applicable is not invalid for indefiniteness.

The Court's opinion upon this point (see Liberty Highway Company case, Rec. p. 35) was predicated on *Kinnane vs. Detroit Creamery Company,* 255 U. S., 102, which was based on *United States vs. Grocery Company,* 255 U. S., 81. In this case, Section 4 of the Food Control Act, passed by Congress in 1917, commonly known as the Lever Act, which made it unlawful to make any unjust or unreasonable rate or charge in handling or dealing in necessaries and to exact excessive prices for necessaries, was held to be invalid because it did not fix an ascertainable standard of guilt and was inadequate to inform persons accused of violation thereof of the nature and cause of the accusation against them.

But in the present case the objection made is not that the penal provisions of the other acts regulatory of common carriers (to which by Section 3 carriers under this act are made subject) do not fix an ascertainable standard of guilt for the offenses which they create. The objection rather is that the statute under consideration does not in Section 3 or elsewhere specify the other acts regulating common carriers which are to apply to carriers under this act, but that it merely states that "so far as applicable" all other acts regulatory of common carriers shall apply to them. The objection then is not that the statutes made applicable are indefinite in their provisions, but that it is uncertain what statutes are applicable. Obviously if a prosecution were brought against any carrier under the act for violation of any of the provisions of any statute regulating carriers, the question could be raised whether that statute was or was not applicable, a question of construction. If held applicable, the question whether its provisions fixed an ascertainable standard of guilt might also arise, but no such question is involved in this case.

Similar provisions to this are common in our statutes and the constitutionality of such provisions has never, so far as we are advised, been questioned.

For instance, Act No. 206 of the Public Acts of 1913, which was considered and sustained in *Traverse City vs. Railroad Commission,* 202 Mich., 575 (see p. 579), declares, as stated in that case, that all corporations operating telephone lines doing business in Michigan are common carriers subject to all *applicable* laws regulating transportation of persons or property by railroad companies within the State.

The Michigan Public Utilities Commission, which is one of the defendants in the case at bar, was created in 1919 as successor to the Michigan Railroad Commission. (See Public Acts of 1919, p. 751.)

Section 3 of the constituting act conferred on the Commission the same jurisdiction in all respects as is now held and exercised by the Michigan Railroad Commission *under the laws of the State pertaining thereto.* Section 4, extending the jurisdiction of the Commission to certain public utilities, gives the Commission the same authority with reference to such utilities *as is granted with respect to railroads and railroad companies under the various provisions of the statutes creating the Michigan Railroad Commission.* This statute has been the subject and basis of much litigation, but this objection has never been raised against it.

IV.

A State may require all carriers over its highways, including those engaged in interstate transportation, to protect their patrons by insurance or bond against injuries sustained in carriage upon the highways of the state.

Upon this subject, the Court below says (Opinion Liberty Highway case, Rec. p. 34).

> "Such provisions of the act as are confined in their application to regulation of common carriers in connection with public highways, are not a direct burden upon interstate commerce, even though

> they may incidentally affect interstate commerce, but any provisions which are not so confined constitute an attempt by the state to regulate, and therefore to unduly burden interstate commerce, and they are for that reason in contravention of the Federal constitution, and void. Such provisions are those contained in Sections 3 and 7 of the act. Section 3 has already been referred to. The provisions of Section 7 providing for insurance and for indemnity bonds for the protection of persons and property carried, are a direct burden upon interstate commerce and are for that reason void."

We apprehend that the statement that Section 3 is open to this objection was inadvertently made. It is clearly erroneous.

As to Section 7, its sole purpose and effect is to provide indemnity for injuries sustained in carriage over the state highways. This the Court holds apparently is not a regulation of common carriers in connection with public highways.

The decisions are to the contrary.

> *Nashville, Chattanooga & St. Louis Ry. vs. Alabama*, 128 U. S., 96.

In this case the State statute requiring locomotive engineers to pass an examination for color blindness, the fee to be paid by the employing company, was held properly to apply to engineers engaged in interstate commerce. The Court say (p. 100) that

> "In *Smith vs. Alabama*, this court, recognizing previous decisions where it had been held that it

was competent for the State to provide redress for wrongs done and injuries committed on its citizens by parties engaged in interstate commerce, * * * very pertinently inquired: 'What is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employes of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the non-observance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and property of others liable to be affected by them?' Of course but one answer can be made to these inquiries, for clearly what the State may punish or afford redress for, when done, it may seek by proper precautions in advance to prevent. * * * Such legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce."

Western Union Telegraph Company vs. James, 162 U. S., 650.

This case holds it within the power of the State to require a telegraph company to use due diligence in delivery of messages received by telegraph from points outside the State directed to points in the State under penalty for failure so to do. The Court say (p. 660) that the statute is in aid of the performance of the duty of the company that would exist in the absence of any such statute, and is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing the duty.

> "The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."

Chicago Ry. Co. vs. Solan, 169 U. S., 133.

This case sustains a State statute, providing that no contract shall exempt any railroad corporation from the liability of a common carrier, or carrier of passengers, which would have existed if no contract had been made, as applied to a claim for an injury happening within the State under a contract for interstate transportation. The Court say (p. 137):

> "It is in the law of the State, that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the

> measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a State, to the protection of that State, as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, according to the law of the State, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions forseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and to punish."

And in conclusion the Court say (p. 138):

> "Its (the statute's) whole object and effect are to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

If the State may require the observance of precautions to prevent injury in transportation within its borders of persons or property carried in interstate commerce and may give remedies for injuries received by persons and

property so carried, it may require the interstate, as well as the State, carrier using its highways to secure indemnity to those sustaining such injuries as a condition precedent to the use of the highways.

A question of estoppel which we understand will be raised by the plaintiff may be briefly considered.

Paragraph 19 of the bill (R. p. 3) avers that the plaintiff's sole business is carrying in interstate commerce under special contract, and that he does not hold himself out as transporting for the public generally. The answer of the defendants other than the Railroad Company (R.p.21) states that if these allegations of paragraph 19 are true (which is not admitted), the plaintiff does not come within the regulations prescribed by the Act, and that the Act does not apply to motor vehicles acting as private carriers. The answer of the Railroad Company, the intervening defendant, (not admitting paragraph 19 of the bill) avers that the purpose of the Act was the control of public highways in the transportation of persons and property for hire by all motor vehicles running over fixed routes or between fixed termini, including those who like the plaintiff (according to the averments of paragraph 19 of the bill) carry under special contract only and do not hold themselves out to carry for the public generally. It avers further that the Act as applied to that class of carriers is valid. (R. pp. 26 and 27.)

We understand that the plaintiff claims that the defendants other than the Railroad Company, who are the public bodies and officials charged with the enforcement of this statute, are estopped by the admission in their

answer from now contending that the Act applies to those who like the plaintiff carry under private contract only; that is, that because their counsel, when the answer was drafted, adopted a construction of the statute now believed to be erroneous, they are estopped from now asserting and contending for a different construction.

It is not claimed that either the plaintiff or the court were misled in any respect by this admission, or that the plaintiff on that account took a different position than he otherwise would have taken.

There is no estoppel by an admission of law arising out of an undisputed state of facts.

People vs. The Pittsburg, Ft. Wayne & Chicago Railway Company, 244 Ill. 166.

Of the two principal questions in the case, that upon which it was decided, was whether a certain city ordinance requiring the elevation of the defendant's tracks caused a vacation of the street and a reverter of the fee to the plaintiffs. The Court held (see p. 170) that there was no such vacation and reverter as a result of the ordinance. The defendants' answer however had admitted that upon the completion of the enbankment upon which they were to lay their tracks, there would be a vacation under the ordinance. After a decision in favor of the defendants, they asked leave to amend by striking out the admission which was denied. It was contended, therefore, by the plaintiff (see p. 171) that defendants were barred by this admission and cannot be heard now to deny the vacation of the street. Overruling this contention, the Court say:

"The admission was one of law and not of fact. It was not made to deceive, and did not deceive or prejudice, plaintiffs in error. They were not induced by it to do or omit to do anything they would have done or omitted had the admission not been made. The admission had no influence upon the decision of the chancellor, for, notwithstanding the admission, the finding was for the defendant and the bill was dismissed. Parties cannot, by their admissions of law arising out of an undisputed state of facts, bind the court to adopt their view. They may, where the admission was made through fraud or where it induced the opposite party to assume a position he would not have assumed had the admission not been made, estop themselves from afterwards denying it. But such was not the case here. Plaintiffs in error were not prejudiced or in any way deceived or injured by it. They knew the facts upon which the admission was based as well as defendants in error knew them. The only effect of the admission was advantageous to plaintiffs in error. Under this state of the case neither the parties nor the courts are bound by such admission."

In support of this decision were cited two earlier Illinois cases, *Holcomb vs. Boynton,* 151 Ill., 294, and *Siegel, Cooper & Co. vs. Colby,* 176 Ill., 210. In the first of these cases, the court held that one who under a mistaken view that a judicial sale was valid, redeemed therefrom, was not estopped from afterwards contending that the sale was void, because the facts were equally known to all parties and because the other parties were not de-

ceived or caused to act differently by what he did. In the second case, the same principle was applied, holding that one who in previous litigation had set up in his answer the claim that a certain lease did not expire until December 31st, 1891, was not thereby estopped from claiming in a subsequent suit between the same parties that the lease did expire at an earlier date.

There can be no estoppel against contending for one construction of the law by previous admission of a different construction, unless some prejudice to the opposite party to the litigation appears to have resulted from his action on such admission.

We submit that the order granting an injunction to restrain the enforcement of this statute against the plaintiff and his business should be reversed.

Andrew B. Dougherty,
Attorney General,

O. L. Smith,
Asst. Attorney General,
Attorneys for Defendants other than Defendant Railroad Company.

William L. Carpenter,
Attorney for Defendant Railroad Company.

H. E. Spalding,
Of Counsel.